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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 416

C. BOYD CORSA, ET AL.,
Plaintiffs-Appellants,

vs.

JOHN P. TAWES, ET AL.,
Defendants-Appellees,

EDWIN ALLISON, ET AL.,
Intervening Plaintiffs-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States District Court for the District of Maryland be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. As applied to fishing for menhaden in the waters of the Atlantic Ocean under Maryland jurisdiction, is the prohibition in Section 259(a) of Article 66C of the Annotated Code of Maryland (1951) against fishing with purse nets an unreasonable and arbitrary exercise of state police power in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

2. Do the provisions of said Section 259(a) constitute an unreasonable or discriminatory burden on interstate commerce in violation of Article I, Section 8, of the United States Constitution?

3. Should this Court undertake to determine whether Section 258 of Article 66C of the Annotated Code of Maryland (1951) violates the equal protection clause of the Fourteenth Amendment or Article IV, Section 2, of the United States Constitution when a determination of such constitutional questions is not necessary to a decision in the case?

STATEMENT OF FACTS

The Atlantic coast line of Maryland extends a mere 28 miles in length between the neighboring States of Delaware on the north and Virginia on the south. The jurisdiction of the State of Maryland over the waters of the Atlantic Ocean extends but 3 miles from the shore line.

The menhaden fishing operations of the Appellants and the Intervening Appellants are carried on from May until October along an extensive portion of the eastern coast of the United States from Montauk Point, Long Island, to Cape Charles, Virginia. Some of the Virginia parties likewise fish in the Chesapeake Bay, but the present suit is con-

cerned only with fishing for menhaden in the waters of the Atlantic Ocean. Schools of menhaden may be found anywhere from the shore line to 40 miles offshore, but fishing generally occurs from one-half mile to 8 miles from the shore. Testimony on behalf of some of the Appellants was to the effect that 20% of their catch was made in waters off the Maryland coast, but the witness could not state what portion of this 20% figure was within the 3 mile limit and thus under Maryland control. Other witnesses testified that no more than 5% of their menhaden catch occurred in waters off Maryland, but again there was no attempt made to specify the percentage caught within Maryland jurisdiction.

The principal piece of equipment used by menhaden fishermen consists of a "purse net", which extends a quarter of a mile in length and is capable of capturing hundreds of thousands of fish. The net is operated by small boats which go out from the mother ship and place the net around a school of menhaden. Such nets may be let down to a depth of 80 feet or all the way to the bottom in shallow water inside the 3 mile limit.

In this suit, Appellants have sought an injunction against law enforcement officers of the State of Maryland to prohibit them from enforcing against the Appellants the provisions of Sections 258 and 259(a) of Article 66C of the Annotated Code of Maryland (1951). Section 259(a) prohibits, *inter alia*, the use of purse nets by any one for catching any type of fish in Maryland waters. Section 258 prohibits the use of nets of any description for the catching of fish in Maryland waters by others than residents of Maryland. However, Appellants have not enforced and do not intend to enforce the provisions of Section 258 against Appellants.

Following a trial of this action before a three-judge United States District Court, an Order dated May 10, 1957 was entered dismissing the Complaint and the Intervening Complaint. In its Opinion, which is reported in 149 F. Supp. 771, the lower court held as follows: (1) that Section 259(a) of Article 66C of the Annotated Code of Maryland (1951), as applied to fishing for menhaden in waters of the Atlantic Ocean under Maryland jurisdiction, did not deprive the Appellants of their liberty or property without due process of law; (2) that said Section 259(a) was not an undue burden on interstate commerce; and (3) that a decision as to whether Section 258 discriminates against non-residents in violation of the privileges and immunities clause or the equal protection clause of the United States Constitution was not necessary to dispose of the case.

From the decree of the lower court, this direct appeal has been taken.

ARGUMENT

The questions presented in this appeal are manifestly so unsubstantial as not to require further argument. In the first place, the effect of the Maryland statute on the large scale fishing operations of Appellants is relatively insignificant. The Maryland statute prohibiting the use of purse nets for fishing in Maryland waters has been in effect in substantially its present form since 1941. Appellants have successfully conducted their fishing operations for a great many years since that date. In view of the extensive range of the menhaden fleet which fishes along hundreds of miles of the Atlantic Coast from the end of Long Island to Cape Charles, Virginia, the elimination of a mere 28 miles of coast line can hardly cause substantial damage to Appellants' business. Furthermore, in the 28-mile area, Maryland can assert jurisdiction only to the 3-mile limit.

Appellants are therefore free to fish with purse nets off the coast of Maryland in the 3 to 40 mile zone where menhaden are found. As disclosed by the testimony, states such as New Jersey and New York have prohibited purse netting in particular areas along their shores. The Maryland law, which has applied the restriction along the whole of its short Atlantic coast, is not one which affects to any measurable degree Appellants' business operations, which have and will continue to be conducted despite local prohibitions against the use of purse nets.

Secondly, the decision of the District Court is plainly correct on each of the three questions raised herein. The law applicable to the constitutionality of state statutes regulating fishing and hunting has been clearly stated by this Court on a number of occasions. *Geer v. Connecticut*, 161 U. S. 519 (1896); *Skiriotes v. Florida*, 313 U. S. 69 (1941); *Toomer v. Witsell*, 334 U. S. 385 (1948). The lower court, after hearing extensive testimony, reached the unanimous conclusion that none of Appellants' grounds for attack could be sustained. The three points decided will be considered hereunder.

I.

Section 259(a) Does Not Violate the Due Process Clause

To sustain Appellants' contention that Section 259(a) of Article 66C of the Annotated Code of Maryland (1951) violates the due process clause of the Fourteenth Amendment, this Court would be required to directly overrule *Manchester v. Massachusetts*, 139 U. S. 240 (1890). The similarity between that case and the present one is remarkable. There, as in the present case, an attack based on constitutional grounds was directed against a state statute prohibiting the use of certain types of nets for taking fish in

state waters. The fish in question were menhaden, and the nets were purse nets. This Court rejected arguments that the statute violated the due process and commerce clauses and affirmed the decision of the lower court holding the statute valid as a reasonable regulation of fishing. This Court said the following at page 265:

> "The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used is for the common benefit; and we are of the opinion that the statute is not repugnant to the constitution and the laws of the United States."

In *Manchester v. Massachusetts, supra*, this Court applied to restrictions against fishing for menhaden with purse nets the well recognized principle that the preservation of game and fish is within the proper domain of the police powers of a state. *Lawton v. Steel*, 152 U. S. 133 (1894); *Geer v. Connecticut, supra*. In *Lacoste v. Department of Conservation*, 263 U. S. 545 (1924), this Court stated the rule as follows:

> "Protection of the wild-life of the State is peculiarly within the police power and the State has great latitude in determining what means are appropriate for its protection."

This Court has even gone further and upheld as constitutional state statutes enacted in support of a state conservation policy, such as an act forbidding the mere possession of nets, traps or seines for fishing in the state waters, *Miller v. McLaughlin*, 281 U. S. 261 (1930), and an act making illegal the mere possession of game during a closed season, *Silz v. Hesterberg*, 211 U. S. 31 (1908).

Congress itself has, by virtue of the Submerged Lands Act of 1953, 43 U. S. C. A., §§1301-1343, withdrawn all claim

that the Federal Government might have to fish or marine life within the 3 mile limit and has recognized the property rights of each individual state in and to the same. Section 1311 of that Act provides that it is in the public interest that (1) title to and ownership of the natural resources within the waters within the boundaries of the respective states and (2) the right and power to manage, administer, develop and use said natural resources be vested in and assigned to the respective states. "Natural resources", under Section 1301, are defined as including all fish and other marine, animal and plant life.

Appellants suggest that advances in scientific knowledge since *Manchester v. Massachusetts, supra*, make unreasonable any prohibition against catching menhaden with purse nets. As the lower court pointed out after hearing the evidence in the case, the complex problem of deciding where to draw the line in conservation is not a question which the courts should decide. It is a matter peculiarly legislative in character. When the action of a legislature is within the scope of its powers, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts but for the legislative body on which rest the duties and responsibility of decision. *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177 (1938).

The Opinion of the lower court sets forth four different grounds for sustaining the reasonableness of the statute in question, as follows:

(a) *The Protection of Commercial Sport Fishing in the State.* Appellants concede that ocean sport fishermen in Maryland have consistently taken the position that fishing for menhaden with purse nets within the 3-mile limit

seriously conflicts with their activities, but Appellants contend that such a position is unjustified. Obviously a conflict must result if sport fishing boats and menhaden boats with their tremendous nets operate side-by-side in the same area within the 3-mile zone. The promotion of sport fishing and the economic benefits derived by the State therefrom are a legitimate legislative objective. As the State's witnesses testified, sociologic and economic considerations are here involved as well as those of conservation. The lower court pointed out that the regulation of purse netting has had a long history in Maryland, and that the administration and enforcement of the State's fishing laws have been matters of perennial and spirited debates in the General Assembly and elsewhere. In the 1957 session of the Maryland Legislature, an act was passed permitting the use of purse nets to catch menhaden. However, because of a defective title the act was vetoed by the Governor. Senate Bill 528, Laws of Maryland 1957, pp. 1663-1665. Appellants' recourse is therefore to the Maryland Legislature, where a properly drawn bill may well be enacted in view of the position taken by the 1957 Legislature.

(b) *The Difficulty of Enforcing the Law.* If an exception for menhaden were carved out of the general prohibition against the use of purse nets, it is clear, as testified by the Chairman of the Maryland Tidewater Fisheries Commission, that it would be very much more difficult to enforce the law insofar as other types of fish were concerned. It is admitted that small quantities of edible fish are caught even when purse nets are used to catch menhaden. In considering the propriety of relaxing a prohibition such as that contained in Section 259(a), a Legislature may clearly concern itself with enforcement difficulties resulting from such relaxation.

(c) *The Use of Menhaden as Food for other Fish.* Appellants contend that since menhaden are inedible by human beings, laws designed to prevent exhaustion of the supply are unjustified. But menhaden are an important source of food for blue fish, rock fish (striped bass) and other species which are edible by human beings. To preserve an adequate supply of blue fish and rock fish, Maryland may justifiably act to conserve their food supply. *Manchester v. Massachusetts, supra* at page 265, held that even though menhaden were merely used as food for other fish, it was a legitimate legislative policy to preserve the supply.

(d) *Preventing the Exhaustion of the Supply.* The evidence indicates that menhaden are used in Maryland as bait for crab pots and also by commercial sport fishermen as bait, and for "chumming" purposes. Several of Appellants' witnesses took the position that the supply of menhaden was at present almost inexhaustible. However, it was admitted that in past years the menhaden population had fluctuated greatly and had even disappeared in some waters where the supply had formerly been abundant. It was further admitted that, of all the factors affecting the supply of these fish, the only one which man could control was overfishing. Certainly Maryland does not have to wait for the supply to begin to dwindle or possibly even disappear before it can constitutionally enact a law designed to preserve this resource.

II.

Section 259(a) Does Not Constitute an Unreasonable Burden on Interstate Commerce.

The prohibition in Section 259(a) against the use of purse nets in Maryland waters applies equally to residents of Maryland and to non-residents, to fish shipped in inter-

state commerce and to fish used internally. Being non-discriminatory in nature, if it is to be found in conflict with the commerce clause, the statute must be held an unreasonable burden on interstate commerce.

In any event, the prohibition of the Maryland statute applies before the menhaden enter the flow of interstate commerce. This distinction was clearly recognized in *Toomer v. Witsell, supra.* In that case, a statute of South Carolina taxing the taking of raw shrimp in the 3-mile zone was held, at page 394, not in conflict with the commerce clause since the taxable event, the taking of shrimp, occurred before the product could be said to have entered the flow of interstate commerce. However, this Court in the same case, at page 406, declared invalid another South Carolina statute, which required the owners of shrimp boats fishing in state waters to dock and unload at a South Carolina port and pay a tax on the catch. In the latter instance, the shrimp had clearly entered the flow of interstate commerce at the time of the state regulation.

In *Geer v. Connecticut, supra,* a Connecticut statute making it unlawful to kill or possess game birds for transportation beyond the limits of the state was attacked on the ground that it violated the commerce clause. This Court sustained the validity of the statute on the grounds that a state had the authority to affix conditions to the killing and sale of wild game within its borders without violating the commerce clause. See also *Manchester v. Massachusetts, supra.*

There is nothing to the contrary in *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1 (1928). The Louisiana statute in that case prohibited the shipping of raw and unshelled shrimp out of the state, but permitted the shipment of the product when it had been produced and prepared

within the state. The Supreme Court, in holding that the statute was in contravention of the interstate commerce clause, noted that the protection of the commerce clause attached at the time of the taking of the shrimp. The Court said that the state, as representative of its people, "might have retained the shrimp for consumption and use therein", but that, in direct opposition to conservation for intrastate use, the enactment permitted all parts of the shrimp to be shipped and sold outside the state. Continuing, the Court stated as follows:

> "* * * but, by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and as to the shrimp so taken definitely terminates its control."

The Maryland statute in prohibiting what the Legislature has deemed an excessively efficient manner of taking fish has applied the prohibition before the state has terminated its control over the product. The right to preserve game flows from the undoubted existence of a state's police power, which may be called into play even if interstate commerce is remotely and indirectly affected. *Geer v. Connecticut, supra*, at page 534. If Appellants' contentions are correct, no state could enact conservation measures to preserve the supply of any species of fish or game which might be shipped in interstate commerce.

III.

Determination of the Constitutionality of Section 258 is Not Necessary to a Decision of This Case.

In their Complaint, Appellants sought to enjoin the enforcement of Section 258 of Article 66C of the Annotated Code of Maryland (1951) as well as of Section 259(a).

Section 258 makes it unlawful for non-residents to fish with nets of any description in the waters of the state. The lower court declined to rule on Appellants' contentions that this Section violates the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment on the grounds that a determination of these constitutional issues was not necessary to a decision of the case.

Appellees concede that if Section 259(a) is in conflict with the due process clause or the commerce clause, as applied to fishing for menhaden with purse nets in the Atlantic Ocean, Section 258 is invalid for identical reasons. If, however, Section 259 is valid, Appellants will not be affected in any way by Section 258. The evidence clearly establishes that Maryland officials will not enforce Section 258 against Appellants since the penalties under Section 259(a) are very much greater. The penalties specifically provided by Section 259(a) are a fine of not less than $100 00 nor more than $1,000.00 and commitment to jail until the fine is paid. Section 258, on the other hand, does not itself contain a penalty clause. The penalty for violating the latter section is, therefore, to be found under the general penalty provisions of Section 300, which provides for the lesser fine of from $25.00 to $100.00.

Appellant Corsa, himself, has been charged with violating solely Section 259(a), and such criminal prosecution is currently pending before the Circuit Court for Worcester County, Maryland. Since the Appellants cannot suffer harm or injury from a statute which would not be enforced against them, it is not necessary to a determination of this case that their constitutional attack on Section 258 be heard by this Court.

CONCLUSION

For the reasons above stated, it is respectfully submitted that by this appeal the Appellants present no substantial question for the decision of this Court and that the decree of the District Court dismissing the Bill of Complaint should be affirmed.

Respectfully submitted.

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